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In the Supreme Court of the United States

OCTOBER TERM, 1959

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS .

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 982

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B) are reported at 276 F. 2d 617.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1960 (Pet. App. B, 55). A petition for rehearing was denied on April 14, 1960. The petition for a writ of certiorari was filed on May 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the seizure of the paraphernalia of a bookmaking operation under a lawfully issued and

executed daytime search warrant constituted an improper taking of private books and papers.

2. Whether the failure of the trial court to permit defense counsel to inspect the formal reports of agent-witnesses constituted prejudicial error where the longhand notes from which these reports were produced were turned over to defense counsel.

STATEMENT

On July 25, 1957, a five-count indictment was returned in the United States District Court for the Eastern District of Illinois. Count 1 charged petitioner Clancy with a wilful misstatement during an interview with Internal Revenue Agents Martin O. Mochel and W. L. Buescher, on or about December 13, 1956, in violation of 18 U.S.C. 1001 (R. 24).¹ Count 4 charged all three defendants—petitioner Clancy, petitioner Kastner, and defendant Prindable, who has not petitioned for a writ of certiorari—with attempting to evade a substantial portion of the amount of wagering excise taxes due and owing the United States for the fiscal year ending June 30, 1957, in violation of 26 U.S.C. 7201 (R. 26-29). Count 5 charged the three defendants with conspiracy to defraud the United States in the administration of the internal revenue laws (R. 29-32).²

¹"R." designates the appendix to petitioners' brief in the court of appeals. "T." refers to the trial transcript, filed with the Clerk of this Court.

²Count 2 (R. 24-25) charged that petitioner Kastner made wilful misstatements at an interview with Agent George W. Kienzler on or about May 6, 1957, in violation of 18 U.S.C. 1001. Kastner was acquitted by the jury on this count (R. 188; T. 368). Count 3 charged a similar false statement on or

Following jury trial, petitioner Clancy was convicted on counts 1, 4, and 5. He was sentenced to four years' imprisonment on each count, to run concurrently, and fined \$5,000 on count 4. Petitioner Kastner was convicted on counts 4 and 5 and sentenced to three years' imprisonment on each count, to run concurrently. He was fined \$2,000 on count 4 (R. 81, 82, 188; T. 368). Each defendant was ordered to pay one-third of the court costs (R. 81-82). The court of appeals affirmed the convictions (Pet. App. B, 23-54).

The facts pertinent to the issues raised in the petition may be summarized as follows:

The Seizure:

1. On May 5, 1957, an Affidavit for Search Warrant was filed by Internal Revenue Agent Glenwood Johnson, detailing the personal observations and activities of various Internal Revenue Agents which had led to the conclusion that a bookmaking operation was being conducted on the top floor of the premises at 2300 State Street, East St. Louis, Illinois (R. 5-18). An affidavit of Joseph M. Heckelbech, Chief of the Collection Division in the Office of the District Director at Springfield, Illinois (incorporated in Johnson's affidavit for the search warrant), stated that, from his official records, he had determined that no gambling tax stamp had been issued for these premises to any person, nor about December 14, 1957, against defendant Prindable (R. 25-26), on which the jury found him guilty (R. 188; T. 368).

³ Defendant Prindable was convicted on counts 3, 4, and 5. He was sentenced to three years on each count to run concurrently, and fined \$2,000 on count 4 (R. 81, 82, 187; T. 368).

had wagering tax returns been filed by anyone at that address (R. 11-13; see R. 14-15).

Satisfied that probable cause was shown, the district court issued a daytime search warrant for the entire second floor of the premises (R. 19-21). The warrant authorized the seizure of "books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business * * * and divers other tools, instruments, apparatus, United States currency and records" used in the wagering business (R. 20).

2. On May 6, 1957, Agent George Kienzler, accompanied by other agents, executed the warrant, seizing at the described premises, *inter alia*, miscellaneous notes, pads, racing forms, scratch sheets, telephone bills, and over \$2,100 in currency (R. 21-23). Agent Kienzler did not determine at that time whether the North Sales Company (a partnership consisting of petitioners and Prindable) had a tax stamp, but simply obeyed the command of the warrant (R. 94; T. 56-57).⁴ A copy of the warrant together with a receipt

⁴ At the trial, the agent testified that petitioner Kastner, who was present when the search was made, informed him that he, Clancy, and Prindable were partners in North Sales, and that Clancy had gotten a tax stamp for the partnership (R. 93; T. 41-42, 50-51). It was further shown at the trial that the North Sales Company had applied for and received a tax stamp for the year ending June 30, 1957, had filed monthly tax returns purporting to show the wagers accepted by them, and had paid the 10 percent tax thereon (Pet. App. B 25; R. 139-142; T. 14-16, 266-271, 273, 275). The applications and returns bore the business address "2401 Ridge Avenue." The words "at Large," which had been written on the same line as "2401 Ridge Avenue," had been pencilled out. There was no clear explana-

for the items seized were given to petitioner Kastner, who was then present on the premises (R. 21, 95). No arrests were made.³

3. On July 25, 1957, defendants' motion for return and suppression of the seized items (R. 36-40) was denied by the trial court (R. 43). It held that the warrant was plainly sufficient on its face, that there was probably cause for its issuance, and that "the items seized were not the private books or papers of these defendants, but rather was property used in the commission of a crime * * *" (R. 48-53).

4. At the trial, after Agent Kienzler identified the items seized, they were admitted in evidence (G. Exhs. 54-112; R. 89-93; T. 39-41, 43-48). Agent Mochel thereupon testified, that his computations, based on exhibits 54-79, revealed that the total wagers accepted by the defendants for March 1957 were \$103,441.30, upon which a net tax of 10% was due and owing the United States (T. 292-295). For that month the defendants, doing business as the North Sales Company, had reported accepting wagers of only \$11,913.50 and had paid but \$1,191.35 in tax (R. 27, 144-148, 151-152; T. 22-23).

The Production of Agent-Witnesses' Statements:

To support count 4 (the tax evasion charge) the government relied essentially upon documentary evidence—the items seized during the search, computation at the trial when this had been done (R. 85-87, 139-142; T. 23-28; see T. 271-272, 274).

³ Some of the information obtained from the seized items was presented to the grand jury which returned the instant indictment (R. 41-42).

tions therefrom as explained by government agents, and the defendants' tax returns. Thus, the production issue basically relates to the false statement charges (counts 1-3) stemming from interviews between Internal Revenue agents and the defendants.

1. Agent Kienzler described at the trial the interview which he had on May 6, 1957, at the time he executed the search warrant, with petitioner Kastner (R. 92-93; T. 41-42, 50-51; see *supra*, pp. 4-5). Defense counsel did not inquire of the witness whether he had taken notes or made a report of the conversation with Kastner. Nor did counsel make any demand for production.

After Agent Ira L. Minton had testified on direct examination that he was present at this interview, and had also described what had been said (R. 96-97; T. 72-74), defense counsel demanded "the production of any statements and reports" of this witness "which relates to the subject matter this witness has testified to" (R. 97; T. 74-82). The judge ruled that only what the witness "wrote down contemporaneously with the making of any statement of the defendant Kastner" would be subject to production (T. 74-75). He denied the request as to "any report this witness * * * made to his superiors * * * subsequent to the conversation * * *" (R. 97; T. 75). Agent Minton stated that he took no notes at the time of the interview but had made a memorandum of the conversation after his return to his office (R. 97-98; T. 77, 83). The request for this report was thereafter renewed and denied by the trial judge (R. 99; T. 82-83).

Petitioner Kastner was acquitted on the false statement charge stemming from this interview (R. 24-25, 188; T. 368).

2. Agent Frank R. Hudak testified to an interview with petitioner Kastner on July 23, 1957, at which time Kastner spelled out his active participation in accepting wagers and keeping records and admitted that he knew the partnership was doing over \$10,000 business each month (R. 104-106; T. 108-112). On cross-examination, the agent testified that longhand notes were taken during the course of the interview and that thereafter they were transformed into a memorandum (T. 113). Pursuant to the request of defense counsel, the agent's notes of the interview were turned over for inspection (R. 106-107; T. 116-117).

Agent Mueller testified that he was present at the July 23 interview of petitioner Kastner (R. 109-110; T. 135-137). On cross-examination, he stated that he had also taken notes of the interview, independent of those taken by Agent Hudak. Upon request of the defense, these notes were also produced for inspection (R. 110; T. 139-140). This agent was not

* From the terms of the demand and the response of the trial judge, it is unclear whether the memorandum incorporating Agent Hudak's notes was also turned over. The colloquy was as follows (T. 116):

Mr. O'Connell: We request now, the statement or memorandum taken by Mr. Hudak and his notes be submitted to us for the examination, your Honor.

The Court: The motion is granted * * *

The opinion of the court below, however, indicates that only the notes were turned over (Pet. App. A, 32-34).

questioned as to whether he had prepared a later memorandum of the interview.

3. Agent Wilbur Buescher testified that on December 13, 1956, he and Agent Mochel interviewed petitioner Clancy, and on December 14, Clancy, Prindable, and Kastner. At these interviews, Clancy explained the betting operations of the North Sales Company and stated that the only agents employed by the partnership to accept wagers were Charles Kastner (petitioner Donald Kastner's brother) and Malcolm Wagstax (R. 99-100; T. 84-87, 87-89).⁷ At the December 14th interview, defendant Prindable said that the Company did not lay off any bets to other bookmakers, that no bets were taken on the phone, and that he did not even know any other bookmakers (R. 100-101; T. 87-88).⁸ On cross-examination, Agent Buescher stated that Agent Mochel took longhand notes of these interviews and that he (Buescher) had thereafter prepared a memorandum from these notes which "agreed with everything in them" (R. 101-102; T. 89-91). The court denied the defense request for the memorandum (R. 102; T. 90-91).

Agent Mochel testified that he was present and took part in these interviews, and corroborated Agent Buescher's recollection as to what was said by petitioner Clancy and defendant Prindable (R. 142-143; T. 279-283). On cross-examination, the agent stated he took notes of these interviews and used the notes

⁷ This testimony was the basis of the false statement charge in count 1. Several witnesses testified for the government that they had accepted wagers under arrangements with petitioners and Prindable (see, e.g., T. 143-147, 151-154, 156-160, 164-168).

⁸ This testimony was the basis of the false statement charge against Prindable in count 3.

in later preparing his formal memorandum (T. 301-302). These longhand notes were turned over to defense counsel for inspection (T. 302-303).

ARGUMENT

7. Petitioners contend (Pet. 7-13) that the seizure at their premises was of private books and papers of evidentiary value only and hence was unlawful. They argue that what may be seized from a gambling business depends upon how the business is carried out. In their view, if a gambler obtains the requisite tax stamp and files monthly wagering returns, the notes and records of the gambling business are, at most, evidence of crime and not subject to seizure.⁹ This contention is without substance.

Whether the illegality is in failing to report, or in reporting falsely, a federal crime has been committed, and in either case every instrumentality used in the commission of such crime is subject to seizure under a validly issued search warrant.¹⁰ See, *e.g.*, *Merritt v.*

⁹ In this connection, it should be pointed out that, since the seized items were subject to inspection by Internal Revenue agents under statute (see, *e.g.*, 26 U.S.C. 4403, 4423, 6001, 7606(a)), they are not private books and papers. Cf. *Shapiro v. United States*, 335 U.S. 17-20, 32-33; *Davis v. United States*, 328 U.S. 582, 589-590; *Wilson v. United States*, 221 U.S. 361, 380-382.

¹⁰ Petitioners' reliance on *Takahashi v. United States*, 143 F. 2d 118 (C.A. 9), is misplaced. In that case customs agents authorized to search at ports of debarkation only for contraband articles seized telegrams and letters without probable cause, or warrant of any kind. Moreover, as the court below pointed out, these items were merely evidence of an intention to commit a crime in the future (Pet. App. A, 40-41). In this case, the items taken were seized under a lawful search warrant and were the normal paraphernalia of bookmaking.

United States, 249 F. 2d 19, 21 (C.A. 6); *United States v. Joseph*, 174 F. Supp. 539, 544-545 (E.D. Pa.); cf. *Harris v. United States*, 331 U.S. 145, 154; *Marron v. United States*, 275 U.S. 192, 194-195. In this case the items seized were the normal paraphernalia of a bookmaking operation—i.e., notes, pads, racing forms, phone bills, and similar items—and were clearly within the scope of the warrant, directed, *inter alia*, to “books, memoranda, tickets, pads, tablets and papers * * * used to conduct the wagering business (R. 20). There is no question that the warrant was issued on probable cause to believe that petitioners were carrying on a bookmaking operation without the requisite tax stamp and without filing the required monthly returns (see the Statement, *supra*, pp. 3-4). Just as an illegal search and seizure is not rendered lawful by what it turns up, so a search and seizure, lawful in the first instance, is not subject to challenge because of subsequently disclosed information.”

2. Soon after the decision below that the agent-witnesses’ formal reports of interviews with the defendants were not statements of witnesses producible under 18 U.S.C. 3500 (Pet. App. A, 47-49), the Seventh

¹⁰ In any event, this information—that petitioners had a tax stamp and had filed monthly returns—would not have rendered the warrant invalid even if it had been known at the time the warrant was issued. The filed papers stated that the partnership was doing business at another address, not the premises which were searched. Since 26 U.S.C. 4412(a)(2) requires that each place of business must be registered, it is clear that the tax stamp did not cover the premises searched and that therefore the warrant was properly issued even if the information later disclosed is taken into account.

Circuit twice ruled the other way. In *United States v. Berry*, No. 12822, decided May 2, 1960, and *United States v. Sheer, et al.*, Nos. 12826-12828, decided May 10, 1960,¹² that circuit held that 18 U.S.C. 3500 did reach the communicated reports of agent-witnesses. These decisions accord with the government's position in *Needelman v. United States*, No. 278, this Term, decided May 16, 1960, to the effect that statements otherwise producible under 18 U.S.C. 3500 are not immunized from production because they happen to be statements of government agents. In view of these later holdings, clarifying the Seventh Circuit's interpretation of the purpose and reach of the "Jencks" Act as it concerns the reports of agent-witnesses, we submit that petitioners raise no production issue of significance warranting review by this Court.

In any event, we believe that, in the circumstances of this case, the trial court's refusal to command the production of agent-witnesses' formal reports constituted harmless error. Following the direct testimony of Agents Hudak, Mueller, and Mochel, longhand notes of the interviews with the defendants, which were prepared contemporaneously with the interviews and constituted the bases of the later prepared reports, were turned over to defense counsel for inspection. And while Agent Buesscher, who along with Mochel had conducted the December 13-14 interviews had not made notes, he testified that his formal memorandum was but a duplication of Mochel's notes "since he agreed with everything in them" (R. 101-102; T.

¹² For the convenience of the Court, these opinions are printed as an Appendix, *infra*, pp. 14-29.

89-91). Petitioners, in short, received the "work-product" from which the reports denied them were compiled, transcribed at the exact time the interviews occurred.¹³ As this Court stated in *Rosenberg v. United States*, 360 U.S. 367, 371: "when the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial." Similarly, it can be said here that, in obtaining the long-hand notes, petitioners were afforded the privilege of examining the original descriptions of the interviews from which the formal reports were compiled and therefore could not have been prejudiced by lack of opportunity to inspect the derivative reports themselves.

Nor was there prejudicial error in the trial judge's refusal to turn over the formal report of Agent Minton. That agent testified that he was present when Agent Kienzler interviewed petitioner Kastner on May 6, 1957, and that he took no notes but prepared a memorandum of what he had heard (R. 96-97; T. 72-74, 82-83). But petitioners never sought to ascertain from Agent Kienzler, who testified in detail as to what Kastner had told him, whether he had taken notes of that interview, nor did they seek to obtain

¹³ As we contended in *Needelman v. United States*, No. 278, this Term, decided May 16, 1960 (Gov. Br. pp. 18-31), we do not believe that defendants are entitled to the non-communicated notes of agent-witnesses under 18 U.S.C. 3500. Therefore, petitioners here may not have been entitled (if the notes were in fact not communicated) to the production of all the various sets of notes. The notes, however, were produced and therefore there is no issue as to them.

any document to impeach Kienzler's testimony. Moreover, the information obtained at the May 6 interview provided the basis of the false statement charge contained in count 2, upon which petitioner Kastner was acquitted (see the Statement, *supra*, p. 2, n. 2). No prejudice could have occurred because the trial court refused to turn over Agent Minton's report of this interview.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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JUNE 1960.

APPENDIX

In the United States Court of Appeals for the
Seventh Circuit

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

No. 12822

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID BERRY,
Defendant-Appellant.

Appeal from the
United States
District Court
for the Northern
District of Indi-
ana.

• May 2, 1960

Before HASTINGS, *Chief Judge*, SCHNACKENBERG,
Circuit Judge and MERCER, *District Judge*.

HASTINGS, *Chief Judge*. Defendant-appellant David Berry and one Sylvester Brown were charged in a two-count indictment with selling heroin in violation of 26 U.S.C.A. § 4704(a); and with the unlawful receipt, concealment and sale of heroin after unlawful importation in violation of 21 U.S.C.A. § 174. On motion of the Government, the two counts were dismissed as to Brown; and defendant was tried by a jury and found guilty on both counts. Judgment was entered on the jury verdict. Defendant was sentenced for a term of five years and fined in the sum of \$5,000 on the first count and was sentenced for a

term of twenty years and fined in the sum of \$5,000 on the second count, the sentences to run consecutively. This appeal followed.

The trial court denied defendant's motions for acquittal made at the close of the Government's case and again at the conclusion of all the evidence. The errors relied upon for reversal relate to the admissibility and exclusion of certain evidence; to instructions given by the court; to the denial to defendant's counsel of the right to inspect a written report of a Government witness; and to certain questions propounded by the Government to one of its witnesses.

In view of the disposition to be made of this appeal, we shall limit our consideration of the alleged errors to the denial of the right of inspection of the written report of the Government witness.

Anthony D. Johnson, a key witness for the Government, testified that he was a federal narcotics agent assigned to Chicago, Illinois; and that prior to the alleged narcotics violations he was in Gary, Indiana, conducting an undercover investigation of illicit narcotics traffic in Gary that subsequently led to the arrest and indictment of defendant. Johnson testified concerning the details of his investigation. On cross-examination, he stated that he made a written report of the case to the Government, giving a copy to the United States Attorney in Hammond, Indiana; that the report was prepared in his office subsequent to his investigation; and that his testimony at the trial was substantially the same as it appeared in his written report given to the Government.

During Johnson's cross-examination, defendant's counsel moved for an order of court directing the Government to produce Johnson's written report for inspection by such counsel for use in further cross-examination for impeachment purposes, pursuant to

the so-called "Jencks" Act, 18 U.S.C.A. § 3500. The trial court sustained the Government's objection to this motion to produce on the ground that the statute was not applicable to this situation, and the motion for inspection was denied.

The pertinent parts of the statute read:

"§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him * * *."

It seems clear that the character of the report of the witness comes within the purview of the statute. Subsection (a) is found to be satisfied when the wit-

ness, who made the report "testified on direct examination in the trial of the case." It is admitted that the "statement * * * of the witness in the possession of the United States * * * relates to the subject matter as to which the witness has testified," as required in Subsection (b). It cannot be seriously doubted that the report is covered by the definition found in Subsection (e)(1) as being "a written statement made by said witness and signed or otherwise adopted or approved by him."

Since the enactment of 18 U.S.C.A. § 3500, following the decision in *Jencks v. United States*, 353 U.S. 657 (1957), a decisional pattern has started to evolve. The statute "and not the *Jencks* decision governs the production of statements of government witnesses for a defendant's inspection at trial." *Rosenberg v. United States*, 360 U.S. 367, 369 (1959); *Palermo v. United States*, 360 U.S. 343 (1959).

Subsection (a) "manifests the general statutory aim to restrict the use of such statements to impeachment." *Palermo v. United States*, *supra*, at page 349. In determining whether, in a doubtful situation, a particular statement comes within the terms of Subsection (e), the Supreme Court approved "the practice of having the Government submit the statement to the trial judge for an *in camera* determination," and said that while the "statute governs the production of documents," it "does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced." *Id.* at page 354. The Court points out that the limiting design of the statute would be defeated if "the defense may see statements in order to argue whether it should be allowed to see them." *Ibid.*

In *Palermo*, the Court held that a Government agent's brief summary of approximately 600 words,

of a 3½ hour interrogation of a witness, was not a "statement" within the definition in Subsection (e). In *Rosenberg*, the Court held that two reports by FBI investigators did not comply with the statute since they "were neither signed nor otherwise adopted by any witness at the trial, nor were they reproductions as statutorily required of any statement made by any witness at the trial." 360 U.S. at page 369.¹ The Court also considered other types of "statements" in that case.

In the instant case we have a Government agent as the witness whose written report to his superiors is sought to be produced for the purpose of his impeachment. The critical question before us is whether such an agent witness comes within the category described in Subsection (a) as being a Government witness who made a report to an agent of the Government. The Supreme Court of the United States has not yet passed upon this precise question.

In *Palermo and Rosenberg*, the defendant sought production to impeach a *lay witness*. Production was denied because the statements in question did not meet the statutory test. To the same effect is the holding in *Borges v. United States*, D.C. Cir., 270 F. 2d 332 (1959).

Cases involving the impeachment of *Government informant witnesses*, following the decision in *Jencks*, include our holding in *United States v. Killian*, *supra*; and *Papworth v. United States*, 5 Cir., 256 F. 2d 125 (1958), cert. denied, 358 U.S. 854. In *Papworth*, the court

¹For statements recently held by our court as not coming within the statute, see *United States v. Clancy, et al.*, 7 Cir., 276 F. 2d 617 (March 24, 1960). For an analysis of the correct procedure for a district court to follow in such cases, see *United States v. Killian*, 7 Cir., 275 F. 2d 561 (January 11, 1960). Each of these cases took cognizance of the holdings in *Palermo and Rosenberg*.

held that the agent's longhand notes made at the time of interrogation were subject to production, but that his subsequent investigative report did not meet the statutory requirement.

Situations concerning a *Government agent witness*, as in the case at bar, in addition to *United States v. Clancy*; *supra*, have been considered by courts of appeal. In *Needelman v. United States*, 5 Cir., 261 F. 2d 802 (1958), cert. granted, 361 U.S. 808 (1959), a narcotics agent made notes of his investigation dealing with defendant, and later prepared an investigative report from them. At trial, the investigative report was delivered to defendant for inspection but the agent's longhand notes were not. The Fifth Circuit affirmed on the ground that the notes did not come within the statute. This holding was followed in *Tillman v. United States*, 5 Cir., 268 F. 2d 422 (1959). In *Bradford v. United States*, 9 Cir., 271 F. 2d 58, 65 (1959), on petition for rehearing, the court reached a result opposite to that in *Needelman* and *Tillman*, grounding its decision on the *Jencks* case rather than the statute. In *Johnson v. United States*, 10 Cir., 269 F. 2d 72 (1959), a government agent case, the court held the memorandum in question was not a statement within the meaning of the statute.

In *Holmes v. United States*, 4 Cir., 271 F. 2d 635 (1959), the court faced and squarely decided the issue before us here, saying:

"The Government now contends, however, that the Jencks Act does not apply to statements prepared by a government agent who becomes a witness at the trial. In the *Jencks* case, itself, the defendant sought the production of FBI reports in order to obtain material with which to cross examine an FBI informer, and clearly that was the situation which Congress had principally in mind when it enacted the Jencks Act. The written report

of the agent, however, is just as much a verbatim statement of the agent, who prepares it, as a written statement of an informer, incorporated in the report, is the statement of the informer. It is a statement within the literal and evident meaning of subsection (e) of the Act. Its use to contradict the agent who prepared it in no way contravenes the policy of the Act against the use of an investigator's notes or summaries of information to contradict his informer. * * *

* * * Certainly, however, we can find nothing in the Jencks Act which suggests that defense counsel are entitled to no statement of the witness, simply because he happens to be an agent of the FBI. * * * (Id. at page 638)

We agree with the rationale and result reached by the Fourth Circuit in the *Holmes* case. We hold that where the nature of the statement sought otherwise meets the requirements of the *Jencks* statute, as in this case, such a written statement prepared by a Government agent may be used by the defendant in cross-examination of such witness for impeachment purposes. It necessarily follows, of course, that the use of such a statement is subject to the limitations and safeguards imposed by the statute and, once produced, its admissibility and use is governed by the proper rules of evidence. The trial court erred in denying defendant's motion to produce the report in question.

Our holding is consistent with *Bergman v. United States*, 6 Cir., 253 F. 2d 933 (1958) and *Lohman v. United States*, 6 Cir., 251 F. 2d 951 (1958), both prior to the *Jencks* case, and with *United States v. Prince*, 3 Cir., 264 F. 2d 850 (1959). In construing 18 U.S.C.A. § 3500, *Prince* relies upon *Bergman* and *Lohman*.

Counsel point to a distinction suggested in our recent opinion in *United States v. Clancy*, *supra*, where-

in it was noted that the Government witness was not an undercover agent witness, but was known to defendants when they were interviewed. While this factual distinction is correct, it was not necessary to our holding in *Clancy* on this proposition. The result in *Clancy* rests on the facts of that case relating to the nature of the notes, reports and memoranda there under consideration.

The judgment of the district court is reversed, and this cause is remanded for a new trial.

REVERSED and REMANDED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

In the United States Court of Appeals
for the Seventh Circuit

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

Nos. 12826, 12827, 12828

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT SHEER, GORDON FOSTER
and THOMAS JACKSON,
Defendants-Appellants.

Appeals from the
United States
District Court
for the Eastern
District of Illi-
nois.

May 10, 1960

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Robert Sheer, Gordon Foster and Thomas Jackson, defendants, appeal from judgments of conviction in the district court entered on jury verdicts. Sheer was sentenced to concurrent five year terms of imprisonment under counts I, II, V and IX, ~~to~~ concurrent three year terms under counts IV and VI, and was fined \$5,000 and costs under count V. Foster was sentenced to concurrent five year terms of imprisonment under counts VII and IX and was fined \$5,000 and costs under count IX. Jackson was sentenced to one year imprisonment and costs under count VIII of the indictment, and under count IX his sentence was suspended and he was placed on probation.

As stated by defendants, the errors relied upon arise out of the overruling of each defendant's motion for judgment of acquittal at the close of the entire case, the improper admission of evidence on behalf of the government, the refusal to limit statements attributed to one defendant to the declarant, the refusal to grant a severance or a mistrial as to Foster and Sheer after admitting into evidence against Jackson a statement attributed to him, the refusal to allow defendants to have certain internal revenue reports for the purpose of cross-examining government's agents, the refusal to allow defendants to have the grand jury testimony of certain witnesses for the purpose of cross-examination, the giving of erroneous instructions, the failure to give certain instructions offered by defendants, the excessive sentences, the failure of the court reporter to transcribe the entire proceedings, the improper selection of the grand jury and the overruling of motions to quash two search warrants and to suppress the evidence seized under those warrants.

The making of false statements in a matter within the jurisdiction of the United States Treasury Department was charged against Sheer in counts I, II, and IV, against Foster in count VII and against Jackson in count VIII. Sheer was therein charged with falsely stating on March 26, 1957, May 6, 1957 and July 3, 1956, that he had no employee or agent accepting wagers on his behalf. Foster was accused of falsely stating on May 6, 1957, to Special Agents conducting a criminal investigation that he never accepted wagers, and that he had no business interest in the Roberts Motel and Bar. Jackson was accused of making a statement on May 6, 1957, that he did not accept wagers. Count V charged that on May 29, 1957, Sheer attempted to evade the payment of

wagering excise taxes due for April, 1957, by filing a wagering excise tax return listing the gross wagers accepted by him as \$1,851.00 and the tax as \$181.50, when he knew the "gross amount of wagers accepted by him" during that month was \$2,365.00 and more and the tax due was \$236.50 and more. Count VI charged Sheer with subscribing and filing a tax return application for registry-wagering, on July 3, 1956, falsely declaring under the penalties of perjury that it was true, correct and complete when it did not describe his place of business, and stated he did not engage any employee or agents in receiving wagers in his behalf.

Count IX charged that, on or about November 1, 1955, or prior thereto and continuing up to and including the indictment date (July 25, 1957), defendants did unlawfully conspire "to defraud the United States in its administration of the Internal Revenue Laws and to violate Sections 7201, 7203, 7206, 4411, 4412, 4901, 7262" of Title 26 and Section 1001 of Title 18, U.S. Code. The indictment then alleged certain matters as a part of the conspiracy. It charged as overt acts each of the other counts of the indictment and three additional overt acts.

As above stated, counts II, VII and VIII charged, respectively that defendants Sheer, Foster and Jackson knowingly made a false and fraudulent statement of a material fact to Special Agents of the Internal Revenue Service on May 6, 1957.

The statute alleged to be violated, 18 U.S.C.A. § 1001, provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or represen-

tations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000.00 or imprisoned not more than five years, or both."

Upon the trial, all of the principal government witnesses were agents of the government. After the direct examination of each of these witnesses, defendants demanded the right to inspect the reports which the agents had made. Defendants were given statements of the agents which were made contemporaneously with the events reported¹ but, under the court's ruling, they were denied other statements. It was the government's position that "we will supply memoranda taken down in questioning defendants at the time of the questioning that took place but we will not show the Internal Revenue *reports* relating to such things or such interviews with the defendants other than verbatim statements reported". (Emphasis supplied.) The court's view was that the defendants "will be entitled to copies of written statements made contemporaneously with the interviews".

After Agent William Edwards testified as to a raid at the Roberts Motel, defendants made a request for his report of what took place during the raid, which request was denied. Agent Donald Yerly testified in substance that he inspected the building at 929½ Missouri Avenue on May 7, 1957, and that he observed smoke in room 5 as well as ashes in a wastebasket which was warm. Across the street was a car in which he had seen Sheer riding. On the same day, after he returned to the office, Yerly made a memorandum report of what he had seen. A request by defendants for production of this report was denied

¹ However, a statement by Agent Glen Johnson was not produced because it had been lost.

by the court, without stating the ground for its ruling.²

The demand for these reports was made for the purpose of impeaching government agents Edwards and Yerly who had completed their testimony on direct examination. *Palermo v. U.S.*, 360 U.S. 343, 345. Defendants rely upon the Jencks Act, 18 U.S.C.A. § 3500, which provides: §.

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in rela-

² While it is not clear from the record that the district court denied production of the reports of Edwards and Yerly because they were not made contemporaneously with the events recounted therein, and while the evidence indicates rather strongly that these reports were made so soon after those events that they were as a matter of fact contemporaneous therewith, we are for the purpose of this case accepting the government's contention that these statements were "not made contemporaneously with the interview on the subject matter" thereof.

tion to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

We have held that this Act applies to government agents who testify for the prosecution in federal criminal cases. *U.S. v. Berry*, F. 2d , No. 12822, May 2, 1960.

We find that the term "statement" as used in the Act applies to the reports made by the agents in this case. A report is defined as "a statement in writing of proceedings and facts exhibited by an officer to his superiors". Webster's Dictionary.

Neither the wording of the Act nor its legislative history indicates any intention of protecting government agents from impeachment when they become witnesses for the government at a trial. If, subject to the safeguards set forth in the Act, the defense is permitted to test the credibility of a government agent when he appears as a witness, the purpose of the law in securing a fair trial is more nearly attained. If an agent's written reports as to matters about which he has testified on direct examination are at variance with his testimony, a well-established ground for impeachment exists. 98 C.J.S. 365. Of course, it is necessary that a foundation for impeachment first be laid by the cross-examiner. 98 C.J.S. 589. Accordingly, in the case at bar, after Edwards and Yerly, two of the principal witnesses for the

government, had each completed his direct testimony, a demand was made by defense counsel for production of their reports but an objection thereto was sustained by the district court. As to the contention of the government, which we are assuming has a factual basis in the record (see footnote 2, *ante*), that these reports were not made contemporaneously with the events therein referred to, we hold that the *time* of their making was not germane to their use as a basis for impeachment. They were statements made by the witnesses Yerly and Edwards as referred to in § 3500(e)(1). They were *not* statements such as those referred to in § 3500(e)(2).

The government contends that defendants are in no position to object to the court's rulings in this respect because they did not move to have the questioned statements marked as exhibits for consideration on appeal. They add that "This should have been done for if the defense is not prejudiced by the withholding the error is harmless." However, it affirmatively appears in the record that defense counsel inquired as to whether the reports were present in the courtroom or available and the response was in the negative. Upon oral argument it was stated to this court, and not denied, that these documents were not physically in the courtroom at the time of the proceedings referred to. Just how the defense attorney could have had the absent statements marked as exhibits by the court reporter does not appear.

Substantial error was committed in the nonproduction of the reports of Edwards and Yerly for use by defendants in their defense in the district court. It is not proper for this court to determine whether defendants were prejudiced by failure to make available to them the prior statements of Yerly and Edwards, any more than it would be proper for the

trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness' testimony in open court. *Bergman v. United States*, 253 F. 2d 933, 936. A reversal of the judgment is required. A remandment for a new trial will be ordered.

In view of that disposition of the appeal, it becomes unnecessary to consider the other grounds urged by defendants in this court.

REVERSED AND REMANDED FOR
A NEW TRIAL.

A true Copy:
Teste.

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*